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A SCHEME IN THE ORGANIZATION OF A BANK BRINGING LOSS WITHOUT HOPE OF PROFIT TO AN INNOCENT PARTICIPANT.

The record in the case of Golden v. Cervenka, 116 N. E. 273, decided by Supreme Court of Illinois, concerns the evolution and consummation of a scheme in high finance, as to the consequences of which the court was gravely divided, there being two very elaborate dissenting opinions.

The burden of these dissents proceeds mainly upon the ground that a bank and state banking officers viewed the plan of organizing a new bank as doing nothing more than avoiding an office rule in a legitimate way and, therefore, no serious consequences should be attached to it. The majority, on the contrary, held, that when the scheme was carried through, the law laid its hands upon the transaction and determined the consequences however innocently it was entered into.

It appears that a national bank in Chicago desired to become a state bank and trust company. There was no way to do this as by statute provided. It was resolved, therefore, to organize the state bank and trust company and turn over to it the assets of the national bank.

But to organize the state bank it was necessary for it to have a cash capital in hand. The stockholders of the old, were to be stockholders of the new, bank, and they did not have the cash required for organization purposes.

To bridge this chasm without the stockholders putting up the required cash, the president of the old, and the prospective president of the new, bank, called on another bank and arranged, in friendly accommodation, for the new bank to give to the old bank a check and the latter to issue to it a cashier's check for $1,250,000. Upon this latter check the accommodating bank would hand to the president of the old bank the above sum for organization purposes only, and then to be returned to it. All of this was done.

In the course of two years or more the new bank passed into the hands of a receiver and actions at law were begun against stockholders and the accommodating bank, the latter for receiving from the new bank the million and a quarter. As said, the majority attached serious consequences to the transaction. It held the accommodating bank was liable to the creditors of the bank thus organized for the money of which it had repossessed itself.

It seems to us this view is altogether correct and that the argument made by the dissentients of good faith in the bank which actually parted with the possession, though but for a moment, of this money, amounts only to a plea that it did not appreciate the law governing its act. And further, even if it be true, that the state officers who were to count the money regarded the transaction as all others did, this was their mistake, or rather it was the bank's mistake to regard their view as controlling.

Let us scan this transaction closely. The bank to be organized gave its check to procure a cashier's check from a bank then organized. This, of itself, is immaterial, except that if the bank agreeing to advance the money to it, knew this was but a means to procure the cashier's check. It knew also it had no lawful power to issue such a check, and that the cashier's check was to be issued upon no consideration whatever.

But even suppose it did not know by what arrangement this cashier's check was to be issued and it was produced to the advancing bank in exchange for the money. Certainly, we will say the issuing bank would be responsible to the

bank advancing money on it and so also would the indorser of the check. But who indorsed it? A corporation which at the moment had no earthly or other existence. But could the corporation springing into existence by the money being used for organizing purposes ratify what had been done? We think not, because, while courts have held, some of them, at least, that promoters' contracts may be ratified, yet they certainly cannot be ratified to the extent that this involves, viz., the very taking away of all support to the claim of existence.

There was discussed by us in 84 Cent. L. J. 135, the question of contract to pay promoters out of corporate funds for solicitation of stock subscriptions and therein we commended the view taken by St. Louis Court of Appeals, that contracts of this kind were not sustainable as creating obligations in a corporation then to be created. See Van Zandt v. Wholesale Grocer Co., 190 S. W. 1050.

This case is plainer than that. It does not pretend to be a promotion contract. It was a mere attempt at evasion of a plain statutory requirement. It contemplated the presence of money placed in the hands, not of a corporation, for that could have no existence when the money was placed. The alembic of conversion into a corporation is in an instant of time. The advancing bank authorized individuals to put the money within its influence. If it had any claim against any person, it had it against a natural person, for there was no other with whom it could contract, and it so knew at the time, except the old bank giving the cashier's check.

But does not all of this round-about business merely emphasize deliberation of attempt at evasion? If there had been no sort of doubt about the right to pass this money over as from one to the other hand, this would be more manifest by merely accepting money. Instead, however, there is an obligation received signed by a maker and an indorser. To say one should not be responsible for a mistake of law in this kind of transaction seems an assault on common sense. It appears to us that the advancing of this money in this way was in this way so as to protect the bank advancing it as being within its chartered powers—investment in bank paper, to-wit: a cashier's check. It had no right to part with money except in a presumably business way. It chose that and definitely losing title to what it parted with, it got it back just as if it was other money entirely.

NOTES OF IMPORTANT DECISIONS.

DIVORCE—DISTRIBUTION OF PROPERTY ON REFUSAL OF.—Why any statute should attempt to divide property between husband and wife, when they still sustain such relationship, is somewhat beyond our comprehension. And yet there are at least two states having statutes, which provide that where a divorce is sued for and refused, the court may make equitable division of the property between husband and wife.

In Kansas, one of these states, the Supreme Court of that state holds, that defendant in a divorce action need not even be advised in the action, that a division is asked for. McCormick v. McCormick, 165 Pac. 285.

In this case a divorce was refused and the court said: "It is contended that the court was not warranted in ordering a division of the property between the parties, as no demand was made in the pleadings for such division. The Code does not require an allegation as to property rights, nor that a demand for a division of the property shall be included in the pleading before an order of that kind may be made. In an action to obtain a divorce where the parties are in equal wrong the court may refuse a divorce, or in any other case where a divorce is refused the court may make an equitable division of the property. The matter of a division is not an essential part of the application for a divorce, but it is a mere incident of it. The right to make a division does not arise until a divorce has been refused, and it is then a matter within the discretion of the court. Parties contending as to the

granting of a divorce are hardly required to anticipate in their original pleadings the refusal of the divorce. A defendant would hardly be consistent if he insisted that there was no ground for a divorce and no reason why the marital relations should not be continued, and at the same time and in the same pleading should ask for a division of the property. Upon refusing a divorce it would be competent for the court to indicate that it had under consideration a division of the property, and to direct the parties to file written statements of their claims as to what would constitute an equitable division, but the practice has generally been to make the inquiry without written statements or formal pleadings of any kind."

It is to be said, that, if this ruling is predicated on the fact, that the defendant was also in the wrong, there is some shadow of ground for the holding, but there ought not to be a ruling thus distinguishing unless the statute plainly so declares. If it is good law so far as a defendant not at all to blame is concerned, the rule may be an easy method of confiscation and an encouragement of all manner of pretended suits for divorce.

STATUTORY CONSTRUCTION — MEANING OF "DEATH" AS CREATING RIGHT OF ACTION UNKNOWN TO COMMON LAW OR CONTRACT.—In Com. ex rel. v. Powell, 100 Atl. 964, decided by Supreme Court of Pennsylvania, it was held that the word "dead" in a statute providing for indigent, widowed or abandoned mothers and children receiving payments from a fund for their benefit, where husbands are "dead or permanently confined in institutions for the insane," does not take into account presumptive death from absence for seven years or more.

The court reasons as follows: "It is unnecessary to dwell upon the rule as to the presumption of the death of a person after the expiration of seven years from the time he was last known to be living, for that rule is not involved in the case before us. When the legislature made provision for women 'whose husbands are dead,' it is to be conclusively presumed that husbands actually dead, and not merely presumably so, were in the legislative mind. The whole matter was for legislative consideration and the legislature might have extended the beneficent provisions of the Act of 1915 to women whose husbands are presumed by law to be dead; but it did not do so, and until it does the act must be construed as it is written, and the word 'dead' given its popular, natural and ordinary meaning. Keller v. Scranton, 200 Pa. 130, 49 Atl. 781, 86 Am. St. Rep. 708."

While we approve of the conclusion reached in this case, we gravely doubt the correctness of the reasoning whereby it is reached, and we do not believe that in statutes generally "dead" means actually "dead." Rather, we think that terms in statutes are, unless the contrary appears, taken in their common law sense, and this sense includes evidence to show that death has occurred.

This statute, however, meant to give to women, "whose husbands are dead," emergent relief, not relief at some time in the future—when the exigency therefor may be presumed to have passed. For example, it would look like improvident legislation for a statute to say that seven years after a husband has died or been permanently confined for insanity, his widow or wife having children shall become entitled to share in a charity fund. Therefore, this legislation should be construed to mean that claimants for relief should establish the facts entitling them to relief within a reasonable time. The context and purpose is a better rule than broadly to announce as the court did its rule. That rule is too all-embracing. It would cut out actions for death from injury which were unknown to our common law, and probably in other cases unknown to our common law, where rights accrue upon death.

COMMERCE—SALE WITH INSTALLATION AS OR NOT MAKING IT LOCAL TRANSACTION.—In Sturtevant Co. v. Adolph Leitelt Ironworks, 163 N. W. 13, the Supreme Court of Michigan holds, that where by a sale of machinery on credit there was an agreement to install and there was not such "intrinsic or peculiar quality or inherent complexity" as made it necessary to effect a sale that the manufacturer should agree to install it, the sale was not in interstate commerce under the ruling in Browning v. Waycross, 233 U. S. 16, 34 Sup. Ct. 578.

The court said: "From all the testimony contained in the record we have reached the conclusion that while the apparatus, the subject of the contract in this case, was somewhat complicated, it had no such 'intrinsic or peculiar quality or inherent complexity' as made it necessary for the manufacturer to agree to install in order to effect sales generally; indeed, the contrary appears from the testimony of plaintiff's witnesses. Many persons named by those witnesses purchase plaintiff's apparatus and install them and make a business of installing them. The fact that defendant did

not show affirmatively that there was a firm or individual in the state of Michigan capable of making the installation (apparently relied upon by plaintiff), is, we think, of no consequence. The record does show that the apparatus of the American Blower Company was installed in place of that which the plaintiff contracted to itself install. The record further shows that it is the claim of plaintiff that its apparatus is 'equal to' the apparatus of the American Blower Company."

These contracts should be bound under some fixed rule. There is no doubt that in many cases agreement to install helps in making a sale, but it should be absolutely essential, as very likely shipments to less remote states would be under a different rule than others, notwithstanding that a manufacturer might hold himself out to sell in every state. But would it make any difference, whether he sends experts into a different state to do the installing? If he could do this, why call any shipment to be installed an interstate contract? The installation could be taken into consideration as a legitimate deduction from the sale price and buyer could engage assistance as well as could seller.

SHOULD THE EXCLUSORY RULES OF EVIDENCE BE MADE MORE LIBERAL TOWARDS THE ADMISSIBILITY OF HEARSAY?

The question of what evidence may be properly submitted to a jury or considered in the adjudication of a case is one which has expanded very much in recent years.

In the first rude state of the trial by jury, as has been said by eminent authorities, the twelve men drawn from the immediate vicinage of the parties or of the fact to be determined, decided in most instances from their own personal knowledge. Hence, arose, as we know, the necessity that a place as well as time should be avowed in pleading every fact. We know, too, that upon one issue, that arising upon the plea of *non est factum*, the witnesses named in the deed, as they usually then were, instead of its being subscribed by them, were required to be summoned as jurors, joined in the inquest, and united in the verdict. Trial by jury, according to the old English law, was a proceeding essentially different from the modern tribunal still bearing the ancient name, by which it has been replaced, and whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty.

Jurymen of the present day are triers of the issue: they are individuals, who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not empaneled to examine into the credibility of the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves; and the verdict was substantially the examination of those witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question, to the best of their belief. In its primitive form, a trial by jury was, therefore, only a trial by witnesses, and jurymen were distinguished from any other witnesses only by the custom, which imposed upon them the obligation of an oath, and regulated their number, and which prescribed their rank and defined its territorial qualification from whence they obtained their degree and influence in society. If any of those knights, who appeared upon the grand assize, happened to be unacquainted with the truth of the matter, they were rejected and others chosen, until twelve were unanimous. If the jurors professed to know the truth, but dissented from one another in their statements of the fact, the array was "afforced," that is to say, other witnesses were sought for, cognizant of the disputed allegation,

until twelve at least could be found, who would give testimony, for that number was deemed almost indispensable. Trial by jury was an appeal to the knowledge of the country; and the sheriff, in naming his panel, performed his duty by summoning those individuals from amongst the inhabitants of the country who were best acquainted with the points at issue. If, from peculiar circumstances, the witnesses of a fact were previously marked out and known, then they were particularly requested to testify. Thus, when a charter was pleaded, the witnesses named in the attesting clause of the instrument, and who had been present in the folk mote, the shire or manor court, when the seal was affixed by the donor, were included in the panel; and when a grant had been made by parol the witnesses were sought out by the sheriff and returned upon the jury.

When this system came subsequently, in the progressive advancement of population and wealth, of necessity to be changed, reasons existed of sufficient force to lead to the adoption of exclusory rules. It was, in effect, but applying with some modification, the rules in regard to the competency of jurors, to witnesses examined before them. It is certain, however, that from the earliest periods, of which authentic records have reached us, the judges, in whose presence the trial took place, have exercised the power of determining what witnesses shall be heard or excluded, and what evidence shall be submitted to the jury. The jury was usually composed of rude and illiterate men. It was supposed to be advisable to keep from them altogether, not only all which was not clearly relevant to the issue, but everything coming from sources open to suspicion. Thus grew up a technical and artificial system, and as jurors became more capable of exercising their functions intelligently, the courts have struggled constantly, so far as they could consistently with the settled principles of such a system, to open the door as wide as possible to the admission of all evidence, calculated to assist in attaining equal justice in the controversy. Hence so many rules and so many exceptions to every rule; so many chapters where the exceptions cover much broader ground than the rule itself.

Some of the concrete evidences of this judicial struggle may be of interest.

The Supreme Court of the United States, in Fourth National Bank v. Albaugh,[1] admitting the testimony of one survivor of a transaction to admissions made by the other party, then deceased, said:[2] "In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay, where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines."

Among the decisions and dicta along this line by the same and other courts we may note just a few:

The case of Phila. & Trenton R. R. Co. v. Stimpson[3] was an action for the infringement of a patent: The court (Story, J.) said:

"There are many cases in which a party may show his declarations comport with acts in his own favor, as a part of the *res gestae*. There are other cases, again, in which his material declarations have been admitted. * * * The conversations and declarations of a patentee, merely affirming that, at some former period, he invented that particular machine, might well be objected to. But his conversation and declarations, stating that he had made an invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known; although not of their existence at an antecedent time. In short, such conversations and declarations, coupled with a description of the nature and object of the invention, are to be deemed a part of the *res gestae;* and legitimate evidence that the invention

(1) 188 U. S. 734.
(2) P. 737.
(3) 14 Pet. 448.

was then known to and claimed by him, and thus its origin may be fixed, at least, as early as that period."[4]

In the case of Furman v. Coe,[5] where it was proved that a trustee was robbed of trust money, it was held, in a suit by his executor after his death, that his declarations as to the amount, made at the time of the loss, were evidence thereof, although not under oath, it having been impossible for him to swear to the same in any legal way. The court said: "It is objected that William Furman, the executor of Robert Coe, never made oath, either as to the robbery or to the identity of the money belonging to the respondents. It has been answered, and I think satisfactorily, that there is no mode pointed out for a trustee, under his situation, to have pursued. Had he made an affidavit, it would have been extra-judicial, and of no more importance than his own declarations. He could not resort to a court of chancery; because, from the time of the robbery until very near the time of his death, which was in 1783, that court was shut. What means could he have pursued under the then state of things, which he did not?"

In the case of Stockton v. Williams,[6] hearsay was held to be admissible to show which of two persons claiming by the same name was the person intended. The chancellor said:

"* * * The right in controversy, it is true, is not an ancient right * * * yet the same necessity exists for admitting this kind of evidence in this case, as in cases involving ancient rights, viz.: The utter impossibility of proving by any other kind of evidence whether Nancy Smith, or Elizabeth Lyons, is the person for whom the reservation was made. * * * General hearsay, or public reputation * * * is good evidence. * * * So is evidence of what a person who is dead has said, who was present at the treaty, and would be likely, from that circumstance, to know for whom the reservation was made. Raborg v. Hammond, 2 Har. & Gill, 42, 52; Cow. & H. notes to Phil. Ev., vol. 2, p. 615, note 462; Weeks v. Sparks, 1 M. & S., 679, per Le Blanc, J., 688 * * * but what a particular person has said, who was at the treaty, and who is still living, and might be used as a witness, should not be received."

In the case of Primm v. Stewart,[7] hearsay evidence was admitted to prove the death of the maker of a power of attorney and its consequent invalidity. In Griffith v. Sauls,[8] A, who was present and assisting in making a survey, pointed out to the witness a corner as made by him when the original survey was made. On the trial, these witnesses were allowed to testify to A's said declarations, the latter's physical condition being such as to incapacitate him from testifying, and hence as fully incapacitated as if he were dead. In Winder v. Little,[9] an *ex parte* affidavit was held to be evidence of the identity of a person, as well as of pedigree. In Keller v. Nutz,[10] the court said: "The *ex parte* affidavit proved to have been made is stronger evidence than what one man heard from another; but where the witness is living, and within the process of the court, the matter to be proved by him must be proved as all facts are."

In another class of cases, the principle is apparently recognized, that if a witness is dead, or his testimony is otherwise unobtainable, his declarations ought to be admitted as the best available evidence; that they ought to be admitted for what they are worth.[11]

In Crouch v. Eveleth,[12] the following language is used by Chief Justice Parker: "* * * The cases in which hearsay, declarations of parties and reputation have been

(4) See also Queen v. Hepburn, 7 Cranch 290; The Estrella, 4 Wheat. 298; Morris v. Harmer, 7 Pet. 554.
(5) 1 Caines Cas. (N. Y.) 96.
(6) Walk. (Mich.) 120.
(7) 7 Tex. 178.
(8) 77 Tex. 630.
(9) 1 Yeates (Pa.) 152.
(10) 5 S. & R. (Pa.) 250.
(11) Sugden v. St. Leonards, 1 Prob. Div. 250; Martin v. Atkinson, 7 Ga. 228; Tillman v. Wetsel, 31 S. W. 433; Gould v. Smith, 35 Me. 513.
(12) 15 Mass. 290.

allowed in evidence are where no better evidence can be supposed to exist. But in the case before us it does not appear that any means have been used to obtain the evidence which ordinarily accompanies facts like those which the tenant would wish to establish."[13] In Patterson v. Maryland Ins. Co.,[14] the following is from the language of the court, Earle, J.: "A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had."

From the decision in Kinney v. The United States,[15] it would appear that the legislature of Connecticut has recognized such evidence as entitled to credit; in which case the court says: "The plaintiff being dead, and this being a suit by his administratrix, the entries and memoranda of the deceased relevant to the issue are admissible in his favor."[16]

In the case of The Estrella,[17] the court said:

"The libel next alleges that the Constitution, previous to her last cruise, had been fitted out and armed, or that her force had been increased, or augmented within the jurisdiction and waters of the United States, and, also, that she had there been manned by sundry citizens or residents of the United States with the same intent. Whatever doubt there may be as to the augmentation of the armament of the Constitution within the United States, the court is satisfied that a very considerable addition was made to her crew at New Orleans, after her arrival at that port; one of the custom house officers declares that at that time she had only 20 to 25 men; another of these officers, who went on board on her first arrival, stated the number of her crew at about 20; and a witness by the name of Guzman, totally unconnected with this transaction, mentions by name two persons who entered on board while she was lying there. Several of the original crew of the Estrella have also been examined to this point, who state that after the capture they had many conversations with the officers and seamen who composed the prize crew, by whom they were informed that the Constitution, when she left Carthagena, had but few hands on board; that at New Orleans she shipped almost the whole of her crew, which, at the time of the Estrella's capture, amounted to 60 or 70 men. This species of testimony has been objected to as being hearsay and proceeding from a source entitled to no great credit; although there may be something in this objection, it is no reason for rejecting the evidence altogether. If the testimony be hearsay, it must be recollected that the declarations proceeded from persons very much interested in giving a different representation of the transaction; and as to the witnesses themselves, although they formed a part of the Estrella's crew, and may have felt some little interest in the question, they were the only persons who could give any account of the armament or crew of the Constitution at the time of her making the capture. It may be also remarked that the testimony of these men is, in this respect, corroborated by that of other witnesses who are liable to no objection, and that their declarations, if untrue, might have been disproved by the claimant, by showing where and when the crew of the Constitution had been entered."

In the case of Morris v. Harmer,[18] Story, J., said:

"The plaintiffs then offered to read from Dr. Drake's work, called 'A Picture of Cincinnati.' * * * To the admission of this book in evidence the defendants objected, the author being (as was agreed) alive and his deposition as to other matters taken in the cause. The court overruled the objection, and admitted the evidence to go to the jury. To this decision also the defendants excepted. If this exception were to be considered solely upon the general principles of the law of evidence, we should think that it was well taken. All evidence of this sort must be considered as mere hearsay; and certainly as hearsay it is of no very satisfactory character. * * *

(13) See also Jackson v. Etz, 5 Cowen (N. Y.) 319; Brown v. Mooers, 6 Gray (Mass.) 451; Orrok v. Com. Ins. Co., 21 Pick. (Mass.) 456; Jones v. East Socy., M. E. Church, 21 Barb. (N. Y.) 161; Earl v. Clute, 2 Abb. Dec. (N. Y. Ct. of Ap.) 1; Powell v. The Governor, 9 Ala. 36; Printup v. Mitchell, 17 Ga. 558; Peterson v. Ankram, 25 W. Va. 56; Manny v. Stockton, 34 Ill. 306.

(14) 3 Harr. & J. (Md.) 71.

(15) 54 Fed. Rep. 313.

(16) Gen. St. Conn. 1888, No. 1094.

(17) 4 Wheat. 297.

(18) 7 Pet. 554.

But we think there are special circumstances in this case which exempt the evidence from the common rule and justify its admission. * * * These answers, which were brought out upon the defendants' own inquiries of their own witness, seem to us to justify the admission of the book of Dr. Drake, for the purpose of explaining, qualifying or controlling his evidence."

In Phillips On Evidence,[19] the learned author states: "In other cases it was held that what one deceased person swore under a commission to take evidence respecting the boundaries, which commission was irregularly issued, and so the oath not receivable as a deposition, would yet come in as hearsay. Bladen's Lessee v. Cockey, 1 Har. & McHen. 230; Long's Lessee v. Pellett, Id. 531; Weem's Lessee v. Disney, 4 Har. & McHen. 156. In another case the court received mere *ex parte* depositions showing the declarations of the proprietors and the reputation of the neighborhood as to a certain fence being the division line between the parties litigant. Sturgeon's Lessee v. Waugh, 2 Yeates 476. So a voluntary affidavit, both parties being present, though objected to, was received to show that a survey excluded the *locus in quo*. Montgomery's Lessee v. Dickey, 2 Yeates 212. The court said it was better than ordinary hearsay or reputation. And see Lilly's Lessee v. Kintzmiller, Id. 28. * * *

"While it must be confessed that those Maryland and Pennsylvania cases have proceeded in utter disregard of the rule repudiating declarations as made *post litem motam*, yet they were mostly, if not all, made before this rule was well established, even in England. In all cases where these declarations have been received, it was first made to appear that the declarant was dead; and several cases have expressly decided that this is an essential condition. Blythe v. Sutherland, 3 McCord. 258. That he is beyond the reach of process of the court is not enough. Gervin v. Meredith, 2 N. Car. Law Repos. 635; Buchanan v. Moore, 10 S. & R. 275, 281. The latter case says that persons who are living and may be produced, must be sworn, and their declarations cannot be heard."

The foregoing cases are not cited as authorities on the law of evidence as it is, but as sign posts of the judicial mind's struggle towards that law as it ought to be; and, unlike citations to a court to establish existing law, the dicta in the cases herein referred to are frequently as weighty for the purpose intended as are the judgments of the court. Sometimes they may be of still greater authority to the legal intelligence, sitting in that Ultimate Court wherein in the course of time even the decisions of the highest prescribed tribunals are poured with the rest, as into a crucible, to be turned out the refined ore of reason and justice. The rule that the decision of the majority shall prevail in judgments of a court is right in the main, and the only one of practicality. This, however, does not prevent frequent errors, which becoming established on the principle of *stare decisis*, leave no hope for humanity so far as they are concerned, save in the appellate power of the Ultimate Court operating upon the legislatures.

The rule, under our system of administering the law, which excludes hearsay and *ex parte* testimony save in certain well-defined exceptional situations, it would seem advisable, therefore, to relax and broaden so as to admit evidence of that class wherever it is the best obtainable. Reduced to its lowest terms, evidence is anything which will aid in carrying conviction to a reasonable mind, and such conviction might be rationally attained, in the trial of a civil issue, by the barely preponderating force of a proved statement, however informally made or poorly tested by cross-examination; while the same degree of acumen enabling a judge to apply the exclusory rule to the matter at hand, could enable him or a

(19) Vol. 1, p. 223.

jury under his instruction to give the evidence no more than its due weight if it were admitted.

Our technical and artificial system, as has been well said, has grown up from the supposed need of excluding from a rude and illiterate jury all questionable facts or assertions. From this entanglement, would not legislative intervention be of benefit? Would it not be a wise enactment to have the competency of hearsay evidence made subject only to the requirement that it be the best obtainable, leaving to the court or to a jury under the court's guidance, the power to determine upon its value?

In Berkeley Peerage Case,[20] a decision by the House of Lords, the following is from the opinion of Mansfield, C. J., referring to hearsay evidence which that court was bound to reject:

"Upon this subject the laws of other countries are quite different; they admit evidence of hearsay without scruple. There is not an appeal from the neighboring kingdom of Scotland in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. This has struck many persons as a great absurdity and defect in the law of that country. But the different rules which prevail there and with us seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland, and most of the Continental States, the judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve."

A learned author also states the Scottish law on this subject: "In this country evidence of what a person since dead or who perhaps has become insane, has said deliberately and seriously, and not in a careless and jocular manner (if such person would have been a competent witness), is admitted in all cases, as it is the best evidence which can be obtained in the circumstances, since the original narrator cannot now be examined. And, in like manner, the examinations of the bankrupt and others taken in the course of a sequestration, although not evidence if those persons be alive, is admitted as hearsay evidence if they have died. * * * All hearsay evidence, even the most direct, is far inferior in weight to the deposition of a witness regularly taken in process, and will only receive such regard as may seem, in the whole circumstances of the case, to be due to it as an ingredient in the evidence."[21]

In our courts having chancery jurisdiction and in various other American tribunals, juries in many cases are no more in vogue than in the Scottish courts to which His Lordship refers in the Berkeley Peerage Case, and his apology for hearsay evidence would therefore be equally applicable to them. In such courts, at all events, the judges could "trust themselves entirely to disregard the hearsay evidence or to give it any little weight which it might seem to deserve."

But unless the theory of our jury system be at fault in civil controversies, why cannot a jury be trusted also, under the court's direction, to distinguish between what the witness states of his knowledge and that which he says was told him; or to decide concerning the value which cross-examination may lend to a statement, under oath or otherwise, or of which it may deprive it by its absence? Certain it is that when evidence of any kind is offered and the jury hears it, the widest possible discrimination is credited to them when they are told by the court that they must reject it. It would presuppose no greater judgment on the part of a jury to leave hearsay also with them, under judicial cautions and instructions; and it would be merely to ex-

(20) 4 Campb. 415.

(21) Tait on Evidence, Edinburgh, 1834; p. 431.

clude no ray of the light for artificial reasons or from undue reverence of precedent.

Under such a practice, much greater importance should be attached to written memoranda, letters, formal unsworn statements, and especially to affidavits, than to reputed oral communications. This arises principally from the ease with which oral statements are changed in transmission—whether due to imperfect hearing or to a desire to improve on the original narrative—but it arises also, in part, from the greater care generally used in writing than in speaking, and is perhaps in some degree owing to the presumed higher intelligence of one who can write over that of a possible illiterate. Certainly affidavits, even those made apart from judicial proceedings, are viewed with less consideration by the courts than they shou'd receive in the absence of better evidence. And in connection with this it may be added that too great importance is attached to the cross-examination feature of testimony in a court or in a legally attested deposition; for the frequent result of cross-examinations, as they are conducted, is to have the witness emphasize that which he has said directly, or perhaps to confuse and lead him to appear to say or assent to the things his interrogator wishes—thus making his testimony of no real value.

The most convincing statements in the history of the human race have been those of certain great writers, inspired and otherwise, and these have been invariably volunteered by the witnesses instead of jerked out of them by the catechetical process. We receive as true purported copies of alleged manuscripts of antiquity, inscriptions on exhumed walls, porticos, coins, etc., but in our courts of justice we refuse even to inspect the sworn ex parte statement of Jones or of Smith, deceased, concerning a matter of which they alone were cognizant. In doing so we treat our juries and judges as certain of the clergy treat their parishioners, holding them unfitted for access to the light save through a screen of greater or less density.

It may be said, the present system of excluding the bulk of hearsay evidence has become enshrined in our hearts and gratefully entombed in a thousand volumes of decisions, that it is satisfactory to the Anglo-Saxon, and cannot be shown by statistics to work injustice. But who hears from the myriads of unsuccessful litigants whose rushlight of truth has been spurned during the ages?

THOMAS M. HENRY.

Washington, D. C.

ANIMALS—PRESENCE ON HIGHWAY.

PARK v. FARNSWORTH.

Oneida County Court. January, 1917.

164 N. Y. S. 735.

Highways are constructed for public travel, and not for animals to stray in, and the owner of fowls has no right to permit them to run at large in the public highway, and if he does he is guilty of negligence.

HAZARD, J. The defendant operating an automobile on a public highway in the town of Camden, ran over or into a turkey owned by the plaintiff, causing its death, and this action was brought to recover for the value of the turkey. The amount involved was trivial, but instances of this sort happen frequently, and I have found the law involved to be somewhat interesting and not at all clearly defined. In fact, I have been unable to find any reported case very closely resembling this one upon the facts, or which sheds any direct light upon the legal status of fowls, etc., wandering at large upon the highway. I apprehend that the amount of care and caution required by a party operating an automobile along the highway, in connection with a flock of fowls which he may or should see wandering alongside the road, is dependent, to some extent, at least, upon the question of the legal right of those birds to be there. It is doubtless true that one operating an automobile may not wantonly run down fowls or animals which are straying in the highway, even if their presence there is illegal.

This case presents the question as to the amount of care requisite from the operator of an automobile, when he sees fowls near that part of the highway which he is approaching. Fowls, like small children, are likely to dart across the highway without paying any attention to the consequences. I believe that the law of the state will soon require, if it does not now, that a person approaching small children near the edge of the highway will be required to operate his car in such a careful and prudent manner that if, in the course of their play, the children start suddenly and unexpectedly to run across the road, the operator can control his car and stop it almost instantly. I doubt if the law of the state now or ever will require such a degree of care with reference to fowls or straying animals. The rule stated, as applied to children, would entail a considerable hardship upon automobile operators; but the lives of children are valuable and must be protected. On the other hand, the lives of fowls or animals are ordinarily not particularly valuable, and their rights in the highway, if they have any, must, it seems to me, give way to the superior right of the traveling public to pass with reasonable freedom and rational speed along the highway. Highways are not built or maintained for animals or fowls to stray in. They are "constructed for public travel." Johnson v. City of New York, 186 N. Y. 139, 147, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824. Judge Beardsley said in the case of Tonawanda R. R. Co. v. Munger, 5 Denio 264, 49 Am. Dec. 239:

"The public interest in a highway comprehends the right of every individual to pass and repass upon it, in person and with his property, at his own pleasure, but confers no right to use it as a sheep walk or pasture ground for cattle."

It was said in Brownell v. Flagler, 5 Hill 282:

"There may have been some slight degree of negligence on the part of the plaintiff in allowing his cow and lamb to escape into the highway; and if the lamb had been killed by a passing carriage, without any intentional fault in the driver, the plaintiff would have had to bear the loss."

This statement, so far as the illustration is concerned, is obiter, but as to the statement of law involved as to the amount of care required by a driver under such circumstances it is not obiter, and the illustration of a lamb killed by a passing carriage under such circumstances represents what I believe to be a correct statement of the law.

Treating the turkey involved in this case as a trespasser on the highway, and I think that was its correct status, it is probably true that the defendant can be held, as stated in the case last before cited, responsible only for "intentional fault in the driver." In other words, I do not believe that the owner of fowls has a right to permit them to run at large in the public highways; and, strictly speaking, in so doing the owner was guilty of a fault. As was said in the Tonawanda R. R. Co. v. Munger case, cited above, an action "founded on the alleged negligence * * * of the defendants * * * cannot be sustained if the wrongful act of the plaintiff co-operated with the misconduct of the defendants * * * to produce the damage, * * * or his beast, while trespassing on the land of another person, * * * may have been damnified through some careless act of the owner of the land, yet the fact of such trespass constitutes a decisive obstacle to any recovery of damages for such an injury. It is, strictly speaking, damnum absque injuria."

Furthermore, it is held that the "law of the road" applies only to vehicles meeting or passing, and that it does not even apply to a vehicle meeting a pedestrian or a man on horseback. Savage v. Gerstner, 36 App. Div. 220, 55 N. Y. Supp. 306. The provisions of the Highway Law (Consol. Laws, c. 25), § 286, pars. 2 and 3, as amended by Laws 1910, c. 374, are in terms confined to cases of meeting, etc. "A person riding, leading or driving a horse or horses or other draft animals," and obviously do not refer to turkeys or other fowls, or strays of any sort. I am persuaded that the law as it stands will hold the operator of a motor vehicle in the case of meeting or passing stray animals or fowls upon the highway liable only for gross negligence or inflicting intentional or deliberate injury. Of course this would not apply to the case of cattle being driven along the highway, as they lawfully might be, nor, if one might suppose such a case, to a flock of fowls being driven along the highway, as I assume they might lawfully be.

Coming down to the evidence in this particular case, it does not appear that a sufficient case even of negligence was made out as against this defendant. He doubtless killed a turkey belonging to the plaintiff, which was probably about all the jury cared to know; but there must have been further proof than that. The case is squarely within the rule that plaintiff must give evidence to show that defendant was negligent, as laid down in Craft v. Peekskill L & R .R. Co., 121 App. Div. 549, 106 N. Y. Supp. 232, and in Dettmers v. Brooklyn Heights R. Co., 22 App. Div. 488, 48 N. Y. Supp. 23. The defendant doubtless saw the

flock of turkeys as he approached them, and could have seen and probably did see that some of them were on one side of the road and some of them on the other. I do not believe the law imposed upon him the duty of slowing down so that he might have his car under control so that he could immediately stop it, just because he might have known, and probably did know, that one of these turkeys might take a notion to cross the road at an injudicious moment. The plaintiff cannot recover here upon any other theory, and no other proofs were given. I will not express an opinion as to the correctness of the ruling refusing to nonsuit plaintiff at the end of his case; but at the end of the entire case the motion was renewed, and it should have been granted. The judgment must therefore be reversed.

Judgment reversed.

NOTE.—*Domestic Animals Running at Large on Public Highways.*—The instant case appears to admit that there is no statute as to animals running at large being found on a public highway, but the matter is treated as if the "turkey" in the case was a trespassing animal and the owner of the automobile as being bound only not to wantonly injure it. We doubt very greatly this conclusion.

In Colvin v. Sutherland, 32 Mo. App. 77, a horse running at large on a highway was injured and the doctrine was invoked that: "He who suffers his cattle to run at large takes upon himself the risks incident to it," but Rombauer, J., rejected the contention saying the horse was not a trespassing animal but was lawfully upon the highway.

In Means v. Morgan, 2 Ala. App. 547, 56 So. 759, where hogs were running at large, it was said the maxim "applies only where the animals are trespassing on the lands of another and not to animals running at large in the highway." It was further said: "The common law rule that animals must be kept on one's own premises does not obtain in this state. The rule is, rather, reversed, and animals are permitted to run at large unless prohibited by statute." citing M. & O. R. R. Co. v. Williams, 53 Ala. 427; Hurd v. Lacy, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61.

In Heist v. Jacoby, 71 Neb. 395, 98 N. W. 1058, a statute to restrain sheep and swine from running at large had nothing whatever to do with their being at large on a highway but was intended for the protection of owners of lands. Therefore where young hogs ran into a highway and frightened plaintiff's horse, causing him to run away, there was no right of action against their owner under the statute or for other reason.

This case cites also Delaney v. Erickson, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep. 487, where it was held that the English doctrine of duty to keep one's animals on his own close had no force in Nebraska.

According to West Virginia decision an owner of an animal not known to be vicious is not liable for injury to a person even on his own land where it is unenclosed, the maxim above referred to not being there applicable, as the common law rule that such owner must keep his animals confined to his own land "is no part of the law of West Virginia." Johnston v. Mack Mfg. Co., 65 W. Va. 544, 64 S. E. 841, 24 L. R. A. (N. S.) 1189.

Certainly one driving on a highway has no higher right as to straying animal thereon than against one leaving excavation on unenclosed land near highway. It has been held that such an act makes the owner of land liable to the owner of a wandering cow. Jones v. Nichols, 46 Ark. 207, 55 Am. Rep. 575. And so where a railroad left salt on its track and a stray cow licked it up. Crafton v. H. & St. Joe R. Co., 55 Mo. 580. And where a merchant left exposed an open barrel of fish brine and a stray cow drank therefrom. Henry V. Dennis, 93 Ind. 452, 47 Am. Rep. 378.

In McLean v. Berkabile, 123 Mo. App. 647, 100 S. W. 1109, it was stated to be the rule in Missouri that the maxim spoken of *supra* was unsuited to that state and that domestic animals should be allowed to range at will over uninclosed lands and owners of cultivated fields were obliged to fence against such animals if they would escape their depredations. It would be a singular rule to declare that a straying animal might be lawfully upon unenclosed land adjoining a highway but unlawfully upon the highway. In Leach v. Lynch, 144 Mo. App. 391, 128 S. W. 795, it was declared that in Missouri "domestic animals are commoners and have a right to run at large, and the party who wishes to keep them off his premises must fence against them."

When an automobilist from a city rides in the country he ought to remember that he has no right negligently to kill animals on highways, and it may be the same in the city. The use of a street or highway is very greatly a matter of custom.

C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE COLORADO BAR ASSOCIATION.

The twentieth annual meeting of the Colorado Bar Association will be held at the Antlers Hotel, Colorado Springs, July 13th and 14th, 1917.

The President's address will be delivered at 10:30 a. m., Friday, July 13th, by Hon. Thomas J. O'Donnell, of Denver. In the afternoon of the same day, Mr. W. W. Platt, of Alamosa, will deliver an address entitled, "Practical Operation of the Drainage District Law in Colorado." At 8 p. m., Mr. Hampton L. Carson, of Philadelphia, will deliver the annual address.

At 9:30 a. m., on Saturday, July 14th, Mr. Robert G. Strong, of Greeley, will deliver an

address entitled, "Conditional Water Decrees." The remainder of the morning will be given to a discussion of the report of a special committee to consider the Act of 1913, conferring power on the Supreme Court to adopt Rules of Practice, and the rules adopted thereunder.

In the afternoon of July 13th, the election of officers and other business of the association will be transacted; and at 7 p. m., will occur the annual dinner.

The present officers are:

President, Thomas J. O'Donnell, Denver.

Secretary and Treasurer, William H. Wadley, Denver.

BELGIAN LAWYER TO ADDRESS AMERICAN BAR ASSOCIATION.

Maitre Gaston de Leval, of the Bar of Brussels, has accepted the invitation of the Executive Committee to deliver an address before the annual meeting of the association at Saratoga Springs, upon "Prussian Law as Applied in Belgium." Maitre de Leval was counsel to the United States Legation, and at the request of the American Minister to Belgium acted as the legal adviser of the English nurse, Edith Cavell, before the German courtmartial which condemned her to death. M. de Leval is residing temporarily in London. Referring to the invitation of the association, he writes to George Whitelock, the secretary, as follows:

"What greater honor can a Belgian lawyer receive than the privilege of addressing the American Bar Association at its annual meeting, and to tell his colleagues all the sufferings which the legal minds have had to endure and are—alas—enduring still in Belgium? Every new decree of the invader was a step nearer slavery, and I hope I shall be able to make all of you realize what that means."

BAR ASSOCIATION MEETINGS FOR 1917—WHEN AND WHERE TO BE HELD.

American—Saratoga Springs, N. Y., September 4, 5 and 6.

Alabama—Birmingham, July 12, 13 and 14.

Colorado—Colorado Springs, July 13 and 14.

Minnesota—Minneapolis, August 7, 8 and 9.

North Dakota—Dickinson, August 16 and 17.

Ohio—Cedar Point, July 10, 11 and 12.

Oregon—Seattle, Wash., July 26, 27 and 28.

South Carolina—Greenville, August 3 and 4.

Tennessee—Epperson Springs, August 30 and 31.

Washington—Seattle, July 26, 27 and 28.

HUMOR OF THE LAW.

"What have you to say for yourself concerning this charge of concealed weapons?" asked the police officer.

"Well," replied the man under arrest, "it shows I'm not a pacifist, anyhow."—Washington Star.

"Sambo, you are accused of stealing a keg of beer from a delivery wagon. Are you guilty or not guilty?"

"Not guilty, sah! Ah don't like beer. Whiskey's mah drink."

"Well, why didnt you steal whiskey?"

"They wasn't no whiskey there, jedge."

Jennison, an old friend of the family, had dropped in to see a young lawyer whose pater was still paying his office rent.

"So you are now practicing law?" said the old friend.

"No, sir," replied the youth, "I appear to be, but I am really practicing economy."

An out-of-town firm, failing to get wind of a mail-order customer, wrote the postmaster:

"Does John Kerwin pay his bills? If his reputation is bad, please give the inclosed bill to justice of peace for collection."

The answer they got from the P. M. took their breath away:

"Gentlemen: I am the John Kerwin about whom you are seeking information. I am also John Kerwin, postmaster. And I am John Kerwin, justice of peace."—Country Gentleman.

"Why did you strike this man?" asked the judge sternly.

"He called me a liar, Your Honor," replied the accused.

"Is that true?" asked the judge, turning to the man with the mussed up face.

"Sure it's true," said the accuser. "I called him a liar because he is one, and I can prove it."

"What have you got to say to that?" asked the judge of the defendant.

"It's got nothing to do with the case, Your Honor," was the unexpected reply. "Even if I am a liar I guess I've got a right to be sensitive about, ain't I?"—Topeka State Journal.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Accord and Satisfaction**—Estoppel.—Where milk purchaser gave check on back of which was written, "This check in payment of all milk received to date, and seller drew line through the words, indorsed check, and deposited it for collection, the seller was not estopped to deny payment in full.—Bisbee v. Pulpit Farm Dairy, N. H., 100 Atl. 672.

2.——Liquidated Debt.—Partial payment of liquidated claim, although accepted in full settlement, is not accord and satisfaction where no consideration is shown therefor.—Clark v. Summerfield Co., R. I., 100 Atl. 499.

3. **Animals**—Pleading and Practice.—In an action for damages for killing a dog, an allegation that defendant willfully and intentionally shot and killed the dog was not demurrable for failure to aver that the killing was wrongful, since the phrase "willfully and intentionally" imports that the act was wrongful.—Minor v. Coleman, Ala., 74 So. 841.

4.——Trespass.—A turkey, straying on a public highway, is a trespasser, and defendant, whose automobile ran over and killed it was not liable to the owner for its value, without proof of defendant's negligence, or that the killing was intentional.—Park v. Farnsworth, N. Y., 164 N. Y. S. 735.

5. **Attorney and Client**—Disbarment.—Where an attorney collected funds of his clients and converted them to his own use, his intent later to return them did not deprive his acts of their unprofessional and wrongful character.—In re Kaas, S. D., 162 N. W. 370.

6.——Discharge.—Under the law of New York, an attorney, although having a contract for a share of any recovery, may be discharged by his client at any time without cause, in which case he is entitled only to the reasonable value of his services rendered.—The Johnson Lighterage Co. No. 24, U. S. D. C., 240 Fed. 435.

7.——Indemnity Insurance.—In an attorney's action for fees against a bonding company, evidence regarding an alleged embezzler's guilt is inadmissible, although plaintiff had agreed to discharge any liability of an indemnitor on accused's bond to the bonding company, since such question of guilt should be directly litigated between accused and bonding company.—Wheelen v. United States Fidelity & Guaranty Co., Wis., 162 N. W. 444.

8. **Bankruptcy**—Assignment.—A creditor, who has assented to assignment by his debtor, may not thereafter file involuntary petition in bankruptcy against debtor, based on such assignment.—In re Henry Campe & Co., U. S. D. C., 240 Fed. 433.

9.——Composition.—Under Bankr. Act, § 12d, as amended in 1910, a composition agreement will not be confirmed where, if the bankrupt's statements to sellers of merchandise were correct, a large amount of assets had disappeared concerning which the bankrupt could give no explanation.—In re Weintrob, U. S. D. C., 240 Fed. 532.

10.——Contempt.—A bankrupt should not be committed for contempt as punishment for disobedience to an order to turn property over to the trustee, even if Bankr. Act, §§ 2(13), 41, authorized such commitment in view of Bankr. Act, § 29.—In re Elias, U. S. D. C., 240 Fed. 448.

11.——Discharge.—Under Bankr. Act July 1, 1898, § 14b (2), as amended by Act Feb. 5, 1903, § 4, the mere failure to keep books, or keeping such books as in fact deceive creditors as to the bankrupt's condition if kept without purpose to conceal, is sufficient to prevent a discharge.—Sherwood Shoe Co. v. Wix, U. S. C. C. A., 240 Fed. 692.

12.——Evidence.—Where the record of a state court showed that appointment of receiver for corporation was made because corporation was insolvent, petitioners for involuntary bankruptcy against corporation need not prove its insolvency and appointment of receiver for that reason, except by record of proceedings in state court.—Greenwood Gum Co. v. Zimmerman, U. S. C. C. A., 240 Fed. 637.

13.——Jurisdiction.—Where, more than four months before filing of bankruptcy petition, state court acquired jurisdiction in receivership of bankrupt's estate, its jurisdiction cannot be interfered with by bankruptcy court.—In re Williams, U. S. D. C., 240 Fed. 788.

14.——Preference.—Deposits in bank by bankrupt only shortly before adjudication held to effect preference, being intended to enable bank to satisfy its own debt.—In re Fairburn Oil & Fertilizer Co., U. S. D. C., 240 Fed. 835.

15.——Prior Lien.—Bankr. Act July 1, 1898, § 47a, cl. 2, as amended by Act June 25, 1910, § 8, does not give the trustee in bankruptcy a lien prior to the lien of a bank to which a written chattel mortgage was given shortly before bankruptcy, in place of a previous oral mortgage valid under the laws of the state, except as against innocent purchasers and lien creditors.—Border Nat. Bank v. Coupland, U. S. C. C. A., 240 Fed. 355.

16.——Provable Debt.—Where a claim as originally filed recited there was no counterclaim nor offset to it, but it appeared that bankrupt had claim and lien against property of claimant, held that claim might be amended so as to require set-off against that of claimant, and extinguishment of lien.—In re claim against Progressive Wall Paper Co. Corp., U. S. D. C., 240 Fed. 807.

17.——Taxes.—Bankr. Act, § 64b, does not authorize payment of taxes out of the fund derived from the sale of goods subject to a landlord's lien, under a distress warrant, in view of section 67d.—Bird v. City of Richmond, U. S. C. C. A., 240 Fed. 545.

18. **Banks and Banking**—Evidence.—Where a bank, to which a check drawn against it had been sent, dishonored the check and had it protested, there was sufficient evidence that it had accepted the check for collection, and the bank cannot deny that it had thereby made itself the holder's agent.—Standard Trust Co. of New York v. Commercial Nat. Bank, U. S. C. C. A., 240 Fed. 303.

19.——Evidence.—Where a deposit slip discloses nothing indicating the money deposited is upon any condition whatever, it constitutes strong evidence that the money was not deposited for a special purpose, or as a special deposit.—McGuire v. State Bank of Tremonton, Utah, 164 Pac. 494.

20.——Evidence.—Evidence that the drawer was insolvent, and that the drawee would have filed a petition in bankruptcy against the drawer if the payee of the draft had attached the drawer's property, is inadmissible to show that the payee bank was not damaged by the negligence of its correspondent bank in notifying it that the draft had been accepted, and in failing to protest the draft.—American Nat. Bank v. Bank of Bandon, U. S. C. C. A., 240 Fed. 624.

21. **Bills and Notes**—Appropriating Deposit.—Where cashier received deposit in his own name with agreement of mortgagor and mortgagee that it was to be used only for constructing a dwelling house on mortgaged premises to enhance security, the bank or its cashier have no right to appropriate deposit in settlement of what mortgagor owes bank.—Peterson v. Crawley, S. D., 162 N. W. 369.

22. **Carriers of Goods**—Initial Carrier.—Under U. S. Comp. St. 1901, §§ 4283, 4289, the railway carrier which accepted goods for shipment by a connecting steamship line was not liable for their loss when the steamship which was seaworthy sank after a collision through fault in navigation.—Price v. Southern Ry. Co., N. C., 92 S. E. 182.

23.——Notify Shipment.—Goods being consigned by bill of lading to shipper's order, "Notify M.," and M. not paying draft drawn on him with bill of lading attached, and receiving bill of lading, till arrival, right of action for delay in transportation is not in him, but in consignee.—F. W McNeely & Co. v. Lake Shore & M. S. Ry. Co., Ind., 115 N. E. 954.

24. **Chattel Mortgages**—Increase of Animals.—After division of lambs between lessor and lessee of band of sheep, lessee having executed mortgage on lambs, held, that mortgage, which previously was subject to lessor's lien, was no longer so subject, as between lessor and mortgagee.—National Bank of Gallatin Valley v. Ingle, Mont., 164 Pac. 535.

25. **Commerce**—Insurance.—The business of insurance is not commerce, and a state may exclude foreign insurance companies from doing business within its jurisdiction.—Thomson v. Meridian Life Ins. Co., Indianapolis, Ind., S. D., 162 N. W. 373.

26.——Instruction by Mail.—A foreign corporation giving instruction by mail to an applicant in New York, held engaged in interstate commerce, and entitled to sue applicant in New York on his contract to pay a monthly premium for instruction, although it had not complied with General Corporation Law, § 15, nor Tax Law, § 181.—International Text-Book Co. v. Tone, N. Y., 115 N. E. 914, 220 N. Y. 313.

27.——Intoxicating Liquors.—The legislature can prohibit the use of public streets or public roads for the transportation of intoxicating liquors, or other commodities dangerous to the public, or the use of which violates the state's public policy, unless such regulation unduly burdens interstate commerce.—Moragne v. State, La., 74 So. 862.

28. **Conspiracy**—Overt Act.—Telegraphic orders by one conspirator to another directing shipment of intoxicating liquor to be made held overt acts under Pen. Code, § 37, to effect a conspiracy to violate Pen. Code, § 238.—Witte v. Shelton, U. S. C. C. A., 240 Fed. 265.

29. **Contracts**—Illegality.—Where milk purchaser told seller that he was subject to prosecution for selling impure milk, but agreed not to prosecute if seller would give him receipt for $100 on account, agreement was illegal.—Bisbee v. Pulpit Farm Dairy, N. H., 100 Atl. 672.

30. **Damages**—Duty to Diminish.—Where contract between plaintiff and his tenant required tenant to deliver cotton at warehouse, plaintiff is not, tenant having breached his contract and made a sale of cotton to defendant, bound to accept two bales of cotton tendered him by tenant, so to diminish defendant's loss.—Markert v. North Augusta Warehouse & Fertilizer Co., S. C., 92 S. E. 201.

31.——Railroad Crossing.—In an action for injuries sustained in a collision at a railroad crossing, damages suffered on account of forced absence from plantation resulting in loss of 30 bales of cotton and several tenants leaving the

place are speculative and too remote for recovery.—Yazoo & M. V. R. Co. v. Williams, Miss., 74 So. 835.

32. **Dedication**—Filing Plat.—Under village plat dedicating street, and providing that fee should not be included in any lot, fee remained in platter, and did not pass to subsequent purchasers of abutting property, but passed by platter's conveyance.—Drake v. Chicago, R. I. & P. Ry. Co., Minn., 162 N. W. 453.

33. **Domicile**—Intention.—Slight degree of understanding is sufficient to enable person to establish his domicile, and mere fact that he is of unsound mind does not necessarily preclude him from so doing.—Hayward v. Hayward, Ind., 115 N. E. 966.

34. **Easements**—Covenant Running With Land.—Where owner conveyed land reserving a right to use part thereof for hauling logs while he owned the remainder, which use should not interfere with business of grantee or his assigns, the easement ran with the land.—Planters' Gin Co. v. Rea, Ga., 92 S. E. 220.

35. **Eminent Domain**—Expert Testimony.—In owner's action for compensation for land condemned, expert witnesses in estimating its market value may consider, as an element, its adaptability for particular use for which it is being appropriated.—Wadsworth v. Manufacturers' Water Co., Pa., 100 Atl. 577.

36. **Exchanges**—Unincorporated Society.—Member of unincorporated voluntary live stock exchange organized to aid orderly conduct of business consents to its reasonable and uniform rules and on violation thereof is subject to discipline they provide.—Ihnen v. South Omaha Live Stock Exchange, Neb., 162 N. W. 422.

37. **Execution**—Setting Aside Sale.—Where personalty is sold by sheriff under execution and it appears that if proper advertisement had been made more bidders would have been attracted, court may set aside sale at the instance of defendant.—Keystone Collieries v. Mudge, Pa., 100 Atl. 526.

38. **Executors and Administrators**—Attorney Fees.—Allowance of fees for services of attorneys employed by an executor or administrator in the settlement of the estate in his hands is to be determined by probate court, and until so determined such fees do not constitute a valid claim against estate.—Trumpler v. Royer, Ohio, 115 N. E. 1018.

39.——Claims.—Where evidence in daughter-in-law's claim against estate of her mother-in-law for six years' services as housekeeper and nurse was indefinite as to time services were rendered, and where deceased sometimes took care of her own house, rejection of claim on ground that there was a presumption that claimant had demanded and received her wages was not erroneous.—In re Carson's Estate, Pa., 100 Atl. 577.

40. **False Imprisonment**—Malice.—Where plaintiff interfered with defendant, who was attempting to arrest another for a misdemeanor committed in his presence, and plaintiff was therefore arrested and put in jail, in absence of malice, defendant was not liable to plaintiff for false imprisonment, it being immaterial whether defendant was a duly appointed city marshal.—Dunn v. Griffin, S. D., 162 N. W. 366.

41. **Fixtures**—Plumbing.—Articles which enhance the comfort of a home, such as parts of a water system, are as a rule considered fixtures, when attached in the usual manner.—Johnson v. Pacific Land Co., Or., 164 Pac. 564.

42. **Frauds, Statute of**—Executed Agreement.—An oral agreement between mortgagee and mortgagor extending time of redemption supported by no further consideration than promise of redemptioner, if so far acted upon that parties cannot be placed in statu quo, is not within statute of frauds.—Thomas v. Hall, Me., 100 Atl. 502.

43. **Highways**—Abandonment.—Where plaintiffs have been in possession of land formerly constituting a highway since its abandonment by town authorities, during which period town has not repaired or recognized the old road, held, that it did not become a highway by prescription, because of its use by public during that period.—Way v. Fellows, Vt., 100 Atl. 682.

44.——Franchise.——Where a toll road franchise granted in 1814 failed to provide for the charging of tolls for automobiles, the company had no right to demand them, and when the road was condemned for a public highway the company was not entitled as damages to the amount of tolls on automobiles.—Peru Turnpike Co. v. Town of Peru, Vt., 100 Atl. 679.

45.——Safety of Premises.—Owner must maintain his premises in a condition of safety to travelers on public road, and, if through his negligence barbed wire becomes detached from fence post and remains lying in road, he is lable under Rev. Civ. Code, art. 2315 et seq., for resulting injury to traveler in exercise of due care.—Atkins v. Bush, La., 74 So. 897.

46. **Husband and Wife**—Accommodation Indorser.—Act June 8, 1893 (P. L. 344) forbidding a married woman from becoming an accommodation indorser, maker, guarantor, or surety, applies only to the technical contract or indorsement, etc., included in the words of the act.—Yeany v. Shannon, Pa., 100 Atl. 527.

47.——Consideration.—Where statute allows a married woman to dispose of her separate estate by deed as if she were a feme sole, the discharge of her husband's debt constitutes a sufficient consideration to support her conveyance of her separate estate.—Thomas v. Halsell, Okla., 164 Pac. 458.

48.——Contract.—Even where loan is negotiated by husband, yet where creditor intends in good faith to extend credit to wife, and consideration of loan passes legally to her, the writings then executed, purporting to bind her for debt as her own, are to be treated as embracing substance of contract.—Longley v. Bank of Parrott, Ga., 92 S. E. 232.

49.——Necessaries.—Where a husband gave his wife money to meet a particular bill, plaintiff, who extended credit to the wife and recovered judgment against her, cannot thereafter recover against the husband, on the ground that he had furnished the wife necessaries.—Green v. Karp, N. Y., 164 N. Y. S. 670.

50. **Insurance**—Change of Beneficiary.—One procuring a benefit certificate and making the payments thereon subject to the terms of the contract, and the written law may change the beneficiary named therein without such beneficiary's consent.—Sueliow v. Supreme Lodge, Knights and Ladies of Honor, Wis., 162 N. W. 346.

51.——Condition Precedent.—Where life policy and premium note provided that contract should be null and void unless note was paid, stipulation was valid, and unless note was paid as promised, or insurer waived payment, recovery on policy could not be had.—Owens v. North State Life Ins. Co., N. C., 92 S. E. 168.

52.——Evidence.—In an action on an accident insurance policy, where insured had died of appendicitis shortly after falling on the sidewalk and injuring his abdomen, and an expert witness had testified that appendicitis was caused by the fall, the jury were justified in so finding.—Aetna Life Ins. Co. v. Wicker, U. S. C. C. A., 240 Fed. 398.

53.——Fraudulent Misrepresentation.—Where an applicant for life insurance was suffering from disease of such latent character that its presence was not discovered by insurer's examining physician, applicant's answers in respect to his diseases were not fraudulent, even though not in accord with facts.—Feinberg v. New York Life Ins. Co., Pa., 100 Atl. 538.

54.——Insurable Interest.—Every one has an unlimited insurable interest in his own life, and may take out a policy on his own life and make it payable to whom he will; it not being necessary that the beneficiary shall have any insurable interest.—Haberfeld v. Mayer, Pa., 100 Atl. 587.

55.——Notice of Accident.—An indemnity insurance policy requiring assured to give immediate written notice of any accident requires such notice to be given within a reasonable time.—Sherwood Ice Co. v. United States Casualty Co., R. I., 100 Atl. 572.

56.——Notice of Loss.—Provision in insurance policy requiring "immediate notice" of loss means as soon as practicable after beneficiary obtains knowledge of loss.—Graves v. Order of United Commercial Travelers of America, Wis., 162 N. W. 425.

57.——Principal and Agent.—Delegation, by title insurance company to another title company, of authority to examine and insure titles to realty, and to issue guaranteed searches for principal company, did not authorize agent company to settle claims against principal company for errors in searches furnished by latter.—Lockwood v. Title Ins. Co. of New York, N. Y., 115 N. E. 981, 220 N. Y. 410.

58.——Stipulation.—Pledging by mortgagee of secured notes does not bar recovery by him on fire policy on mortgaged property having a mortgage clause in his favor; the stipulation in policy against change in interest, title, or possession of the subject of insurance not applying.—Mechanics' & Traders' Ins. Co. v. Boyce, Miss., 74 So. 821.

59.——Surplus Over Debt.—Where life insurance policy taken out to secure debt makes no provision as to what shall be done with any surplus after debt is paid, insured's personal representative is entitled to such surplus.—Haberfeld v. Mayer, Pa., 100 Atl. 587.

60. **Intoxicating Liquors**—Action on Bond.—In wife's action against saloonkeeper for loss of support of husband by sales of liquor, brought under Pol. Code, § 2844, as amended by Laws 1909, c. 247, it is immaterial whether the husband was intoxicated at the time of the sales or whether such sales resulted in his intoxicaton.—Strong v. Thompson, S. D., 162 N. W. 385.

61.——Collateral Attack.—Judgment regularly entered by justice of the peace, ordering the destruction of intoxicating liquors unlawfully imported into the state, cannot be assailed collaterally by an action against the officer holding the liquor under the judgment.—Blumhardt v. McDonald, N. D., 162 N. W. 409.

62.——Time of Essence.—Time is not a material ingredient of the crime of keeping and maintaining a common nuisance contrary to the provisions of the prohibition law of the state.—State v. Webb, N. D., 162 N. W. 358.

63. **Landlord and Tenant**—Agreement to Repair.—Farm tenants whose property was injured by the landlord's failure to repair as he covenanted can recover damages for such injuries, where they had not sufficient funds to make the repairs themselves, and no other place of storage was available.—Cramer v. Baugher, Md., 100 Atl. 507.

64.——Minimizing Damages.—Where failure of landlord to construct headgates to irrigate land caused crop failure on large portion of land planted, lessees cannot be denied recovery on ground that they should have constructed headgates; it appearing that they would have cost upwards of $2,000.—Chambers v. Belmore Land & Water Co., Cal., 164 Pac. 404.

65. **Libel and Slander**—Privilege.—An action for libel does not lie because of filing of petition with district attorney, charging dshonesty or other unfitness in a public officer, subject to removal by court to which petition is addressed, where communication is made in good faith, without malice, and with probable cause.—Glisson v. Biggia, La., 74 So. 907.

66. **Mandamus**—Remedy.—Mandamus is a proper remedy to compel county board of education to approve tender of bond of a duly elected county school commissioner, conditioned on his faithful performance of his duties under the law, the amount and sufficiency of bond being proved.—Jones v. Mattox, Ga., 92 S. E. 202.

67. **Master and Servant**—Contributory Negligence.—Where an employe operating a separator, after removal with his knowledge of casing over a gearing, put his hand between uncovered gearing and separator while separator was in motion, an act which would have been impossible before removal of such casing, and was injured, he was guilty of contributory negligence.—Butler v. Kilpatrick, S. D., 162 N. W. 371.

68.——Course of Employment.—Injury to city workmen going into small toolhouse, used in connection with its stone crusher, to eat his noon meal, killed by explosion of gasoline when he lit his pipe, arose out of or in the course of his employment, within Workmen's Compensation Act.—Haller v. City of Lansing, Mich., 162 N. W. 335.

69.——Independent Contractor.—Where the landlord, under no duty to make repairs, volunteered to make them, and the independent contractor employed by him failed to properly support a board in the floor, and the tenant was injured, the landlord was not answerable for his negligence.—Schatzky v. Harber, N. Y., 164 N. Y. S. 610.

70.——Independent Contractor.—The rule relieving an employer from liability for negligence of an independent contractor does not apply where the law imposes upon him the duty to keep the subject of the work in a safe condition.—Hudgins v. Hann, U. S. C. C. A., 240 Fed. 387.

71.——Inexperienced Servant.—A 16-year-old employe at work upon ice cream wagon with open sides, from which he fell, and was injured, needed no instruction, and could not claim that he acted on his employer's judgment, where he was mentally well developed, and where incidental dangers of situation were apparent.—Hurley v. Edward E. Rieck Co., Pa., 100 Atl. 540.

72.——Ordinary Care.—It is duty of mining company to exercise ordinary care to keep planks placed on cross-ties between rails of its tracks in reasonably safe condition, so as not to cause injury to operator of motor, and that duty is continuous.—Daly Judge Mining Co. v. Towey, U. S. C. C. A., 240 Fed. 658.

73.——Pleading and Practice.—In an action for damages for killing a dog, an allegation that the person killing the dog was acting under defendant's instructions was not demurrable, as not alleging that the servant was acting within the scope of hs authority.—Minor v. Coleman, Ala., 74 So. 841.

74.——Respondeat Superior.—Where a servant using the master's automobile killed a pedestrian, that a superior servant saw the servant drive away with the automobile would not establish the master's consent so as to render him liable in the absence of showing that the superior servant had charge of the automobile.—State v. C. J. Benson & Co., Md., 100 Atl. 505.

75. **Mines and Minerals**—Royalties.—Under coal mining lease a provision, requiring minimum royalties to be paid commencing three years after date of lease, required payments to be made, although no coal was removed, in absence of proof by lessee that the consideration had failed because no coal existed in merchantable quantities.—Rowland v. Anderson Coal Co., Iowa, 162 N. W. 321.

76. **Municipal Corporations**—Additional Servitude.—Operation of commercial railroad upon public street imposes additional servitude, which municipality cannot authorize.—Drake v. Chicago, R. I. & P. Ry. Co., Minn., 162 N. W. 453.

77.——Evidence.—Evidence that a fence post, from which a gate was swung, had been obviously decayed for six months, is sufficient to

show negligence by the city, allowing recovery by one who fell across the gate within one hour after it fell on the sidewalk.—Caston v. City of Rock Hill, S. C., 92 S. E. 191.

78.——Law of Road.—San Diego ordinance requiring every driver of a vehicle to travel on the right side of the street as near the right-hand curb as possible does not prohibit the use of the left-hand side of the street under all circumstances.—Langford v. San Diego Electric Ry. Co., Cal., 164 Pac. 398.

79.——Ordinance.—Milwaukee City Ordinance, § 1247, and St. 1915, § 1636—49, requiring automobiles to stop where street cars are taking on or discharging passengers, is for benefit of pedestrian advancing in street to board a waiting street car.—Zimmermann v. Mednikoff, Wis., 162 N. W. 349.

80. **Negligence**—Assumption of Risk.—That decedent stepped through the doorway of an automatic elevator shaft without looking to see if the cage was in place, held not contributory negligence precluding recovery for her death where the customary use of the elevator justified her in assuming that the door could not be opened, unless the cage was in place.—Jacobi v. Builders' Realty Co., Cal., 164 Pac. 394.

81.——Imputability.—If the occupant of an automobile exercises control over the driver or possesses power of control, the negligence of the driver is imputable to him.—Bryant v. Pacific Electric Ry. Co., Cal., 164 Pac. 385.

82. **Pledges**—Redemption.—A provision in a contract of pledge that upon default pledgee shall have absolute property in goods is invalid, and pledgor on paying what he owes may redeem.—Eckert v. Searcy, Miss., 74 So. 818.

83. **Poisons**—Negligence.—In an action for damages caused by drinking whiskey containing wood alcohol, evidence held not to show any negligence on the part of the wholesaler who sold the whiskey to the retailer from whom plaintiff bought it.—Fiaccomio v. Eysink, Md., 100 Atl. 510.

84. **Principal and Agent**—Undisclosed Principal.—The rule that an undisclosed principal may sue upon a contract made by his agent does not apply to a case where an alleged agent made affidavit that he was owner of personal property exchanged for real estate, and gave a note in his own name, and in every way acted as principal in transaction.—Crowder v. Yovovich, Or., 164 Pac. 576.

85. **Principal and Surety**—Application of Payments.—A bank does not owe a surety on a note the duty to apply or credit the amount the principal may have on deposit in the bank at or after the maturity of the note to the payment of the note, whether or not the amount be sufficient to satisfy the note.—Moreland v. People's Bank of Waynesboro, Miss., 74 So. 828.

86. **Prostitution**—White Slave Act.—In the White Slave Act, debauchery is not limited to seduction, but includes exposing a woman to influences tending to lead her to sexual immorality, or intending her to engage or continue more or less habitually in sexually immoral practices.—Van Pelt v. United States, U. S. C. C. A., 240 Fed. 346.

87. **Railroads**—Exclusive Right.—A railway company may legally contract with a transfer company giving it exclusive right to solicit from passengers the privilege of transferring baggage.—Baggage & Omnibus Transfer Co. v. City of Portland, Or., 164 Pac. 570.

88.——Negligence.—The storage of cars on a side track near to, but not encroaching upon, a public street, is not negligence which renders the railroad liable for injuries to an automobile driver at the crossing.—Chicago, I. & L. Ry. Co. v. Prohl, Ind., 115 N. E. 962.

89. **Remainders**—Vested.—Where a corporation transferred shares held by legatees whose interest might be terminated by their death without issue, a right of action against the corporation for the stock or its value did not accrue, so far as the statute of limitations is concerned, until the legatees' deaths without issue.—Baker v. Atlantic Coast Line R. Co., N. C., 92 S. E. 170.

90. **Sales**—Words and Phrases.—Where issue upon which a suit on notes given in payment for machinery was whether the machinery was in "full" operation, the word "full" is to be construed to mean that the machinery was complete in essential parts or capable of perfect operation.—Nelson v. Hall, Fla., 74 So. 877.

91. **Subrogation**—Volunteer.—Where owner conveyed lots to a married woman subject to a mortgage and she conveyed to another subject to first and second mortgages, and before her conveyance one M. sued her and her husband and established a lis pendens and they were sold to M. subject to mortgages, plaintiff, who, pending M.'s suit, loaned second grantee money to pay mortgages and took third mortgage was a volunteer and not entitled to subrogation to rights of first mortgagee.—Employes' Building & Loan Ass'n v. Crafton, Okla., 164 Pac. 473.

92. **Telegraphs and Telephones**—Use of Streets.—Under the legislative grant by Code 1873, § 1324, as amended by Acts 19th Gen. Assem. c. 104, held that telephone company had unlimited right to use public streets of a city with its poles, wires, etc., rent free, and this right continued until revoked by state in exercise of its reserved powers.—City of Des Moines v. Iowa Telephone Co., Iowa, 162 N. W. 323.

93. **Trusts**—Spendthrift Trust.—A "spendthrift trust," under Revisal 1905, § 1588, is one wherein the cestui has no right to the principal or income, and the income is not subject to payment of the cestui's debts.—Fowler & Lee v. Webster, N. C., 92 S. E. 157.

94. **Vendor and Purchaser**—Rescission.—The right to rescind and recover partial payments made and for improvements depends on the grantee's equitable right of rescission, which does not exist unless he alleges some fact making it inequitable for the grantor to hold the money paid and collect the balance.—Mathias v. Crowley, Ga., 92 S. E. 213.

95.——Unrecorded Deed.—The purchaser of real estate cannot be affected by unrecorded claims against the property, even though at the time of the purchase he had actual knowledge of them.—Soniat v. Whitmer, La., 74 So. 916.

96. **Water and Water Courses**—Superior Rights.—Where Carey Act Construction company contracted to furnish desert land entryman water, right to use of which becomes appurtenant to land, and issued to him stock of company intended to become owner of irrigation system retaining possession thereof as security for payments, and did not record contract, entryman's subsequent recorded mortgage, taken without notice, under Rev. Codes, § 3160 was superior to company's lien.—Ireton v. Idaho Irr. Co., Idaho, 164 Pac. 687.

97. **Weights and Measures**—Ordinance.—Under an ordinance declaring that one knowingly selling commodities at short weight shall be fined, knowledge is an essential element of the offense, and where complaint did not charge that sale was by short weight to defendant's knowledge, and no evidence thereof was offered no violation was shown.—State v. Washed Sand & Gravel Co., Minn., 162 N. W. 451.

98. **Wills**—Construction.—A will devising property to husband of testatrix for life with power to sell and giving what remained in his possession at his death to a nephew, held, that the clauses were consistent and gave the use and enjoyment to the husband during life and the property not sold to the nephew.—Forrest v. Jennings, S. C., 92 S. E. 189.

99.——Remainder.—Will giving property to testator's wife with full power and control of it, and in next clause providing that after wife's death it should be divided between his sons, gives to testator's wife, not fee, but life estate with power to dispose of corpus of property if necessary with remainder over to sons.—In re Olson's Will, Wis., 162 N. W. 429.

100. **Witnesses**—Blood Hounds.—When evidence that blood hounds trailed defendant to his home is admitted, defendant should have the fullest opportunity by cross-examination to inquire into the breeding and training of the dogs, and into all circumstances and details of the hunt.—Jones v. State, Ala., 74 So. 843.